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NOTES.

GOOD CONSCIENCE AS THE DECISIVE FACTOR IN DETERMINING THE PRIORITY OF EQUITIES.—The fundamental principle that a court of equity has jurisdiction only *in personam*[1] gives rise to the doctrine that the beneficiary of a trust, whose remedy is of course purely equitable,[2] is the owner of no right *in rem*, but of an obligation against the trustee. It further seems that his rights against the trustee or a stranger who has acquired an interest in the trust *res* or has come into possession of it, cannot be determined simply by the common method of applying the much abused maxim that "of equal equities the first in time shall prevail."[3] The indiscriminate use of this and other maxims has led the authorities into much confusion,[4] and it is submitted that in a tribunal whose jurisdiction is based solely upon rules of conscience,[5] the rights of the parties must depend upon their relative

[1]J. R. *v.* M. P. (1459) Y. B. 37 H. VI *fol.* 13 *pl.* 3.

[2]Norton *v.* Ray (1885) 139 Mass. 230; Ewing *v.* Ewing (1883) L. R. 9 App. Cas. 34, 40.

[3]It is, of course, a prerequisite to the application of this maxim that the conflicting equities should be against the same individual and with respect to the same *res.*

[4]1 Pomeroy, Eq. Jur. (3rd ed.) §§ 413, 414, 415.

[5]J. R. *v.* M. P. *supra;* see Boone *v.* Childs (1836) 10 Pet. 177, 210.

conduct judged by the standard of good faith. Thus the *cestui que trust* will be protected from any inequity on the part of the trustee, and similarly may enforce his equitable rights against any third person[6] who has taken with notice of the trust, or who, though acting in ignorance, has suffered no detriment which would entitle him to the favor of the court.[7] Furthermore, since a stranger, who without notice of the trust has paid value for any equitable right against the trustee with reference to the *res,* has done nothing in any degree reprehensible, he should not be deprived of any specific benefit which he may have received from the trustee, in pursuance of such right, even though the act of the trustee is a fraud upon the original beneficiary.[8] Upon notice, however, since a court of equity will neither permit nor encourage a breach of trust, the stranger may accept neither the trust *res* nor any legal or equitable interest therein, beyond what at the time of notice he had already acquired.[9]

There seems to be no little conflict among the decided cases when the additional question is presented of the effect of actual possession of the *res* upon opposing equities otherwise equal.[10] It is submitted that the solution of the problem will be found in a logical application of the principles outlined above. The merit of the position of a *bona fide* purchaser for value of an equitable claim depends upon his having given consideration, and clearly therefore extends only to the subject matter for which such consideration in fact was paid. Accordingly if the value was paid merely for an equity neither entitling the purchaser to possession of the *res* nor carrying the right of possession with it, then actual possession contemporaneously or subsequently acquired would obviously be based upon no consideration whatsoever. Since therefore for this fortuitous possession the purchaser could claim to have paid no value, it would seem that it could not, even if acquired in good faith, entitle him to favor on the part of a court of chancery, nor invest him with any higher right with reference to the trust *res* as against a person with prior equity, than he otherwise would have possessed. Conversely, if the right to actual possession formed part of the subject-matter of his purchase, and if in addition he took without notice, obviously he would have a complete defense to any claim of the original *cestui que trust,* and he would not be disturbed by the court. Finally, if the purchaser had acquired before notice, in addition to his right in equity, a power enabling him to secure a legal title, as in the case of a pledge, it would be clearly unjust to prevent his exercising it even after notice, since

[6]The phrase "following the trust *res* into the hands of a stranger" as commonly used in this connection signifies no right *in rem,* but simply the power of equity to compel the stranger, if he cannot in good conscience keep the *res* for his own benefit, either to surrender it or to hold it subject to the trust. The same explanation accounts for the expression which characterizes the right of the *cestui que trust* against the stranger as one *in personam ad rem.*

[7]2 Perry, Trusts (5th ed.) § 828; Knight *v.* Knight (1885) 75 Ga. 386.

[8]See Heath *v.* Crealock (1874) L. R. 10 Ch. App. 22.

[9]Ortigosa *v.* Brown (1878) 47 L. J. Ch. [N. S.] 168; Bush *v.* Bush (S. C. 1849) 3 Strob. Eq. 131; Wigg *v.* Wigg (1739) 1 Atk. 382; Gallion *v.* M'Caslin (Ind. 1820) 1 Blackf. 91.

[10]Possession of Title Deeds, 30 Sol. J. 72, 73; Lloyd's Banking Co. *v.* Jones (1885) L. R. 29 Ch. Div. 221; Rice *v.* Rice (1854) 2 Drew. 73; Manners *v.* Mew (1885) L. R. 29 Ch. Div. 725.

he could do so without seeking the forbidden assistance of the trustee.[11]

An application of the foregoing principles seems to have been necessary to determine the priority of rights between the parties in the recent case of the *First Nat. Bank of Auburn* v. *The Eastern Trust & Banking Co.* (Me. 1911) 79 Atl. 4. A company deposited money, which it held in trust for the plaintiff bank, in its individual deposit account with the defendant bank, giving no notice of the trust relation. Subsequently, after notice and demand, the defendant refused to satisfy the plaintiff's claim, but later applied the money in payment of notes on which the depositor company was indebted to the defendant, and which were overdue at the time of the deposit of the trust fund. The plaintiff successfully relied on the artificial rule of law permitting a *cestui que trust* to follow trust funds even when so mingled by deposit to the trustee's personal account that their identity is lost.[12] The court, however, failed to consider the nature and effect of the banker's lien, which attaches upon the account of any depositor who is at the same time indebted to a bank,[13] and which therefore in the case under consideration came into existence in favor of the defendant before notice of the plaintiff's claim. Obviously such a lien upon securities deposited in a bank must be in the nature of a pledge giving not only a right in equity and the right of possession, but also power to appropriate in payment of the debt,[14] and it has been intimated that this doctrine is equally applicable to a deposit of funds, such as that in the principal case.[15] Since, however, in such circumstances the lien attaches to a mere account, which is simply a debt of the bank to the depositor, it clearly follows that it operates in effect as a set-off to any claim by the depositor against the bank.[16] In either view of the nature of the lien, however, since the right is complete in itself and may be exercised by the appropriation of the funds without the assistance of the trustee, it is apparent that it would be inequitable to prevent the defendant, even after notice, from making such an appropriation.

CLASSIFICATION OF EXTRAORDINARY DIVIDENDS AS CAPITAL OR INCOME.—When corporate stock is devised in trust to pay the income to one for life, with remainder over of the shares themselves to another, the courts of different jurisdictions, all professing the single purpose of effectuating the wishes of the testator as declared in the will, have reached irreconcilable conclusions as to the merits of the respective claims of the life tenant and remainderman to extraordinary or bonus

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[11]Dodds *v.* Hills (1865) 2 Hem. & M. 424; see also Roots *v.* Williamson (1888) L. R. 38 Ch. Div. 485.

[12]9 COLUMBIA LAW REVIEW 716; *In re* Mulligan (1902) 116 Fed. 715; *In re* Hallett's Estate (1879) L. R. 15 Ch. Div. 696, 709.

[13]Nat. Bank *v.* Insurance Co. (1881) 104 U. S. 54; Mt. Sterling Nat. Bank *v.* Green (1896) 99 Ky. 262.

[14]1 Morse, Banks & Banking (3rd ed.) Ch. XXII; see Reynes *v.* Dumont (1889) 130 U. S. 354.

[15]1 Morse, Banks & Banking (3rd ed.) Ch. XXII.

[16]School District in Greenfield *v.* First Nat. Bank (1869) 102 Mass. 174; but see Appeal of the Liggett Spring & Axle Co. (1885) 111 Pa. St. 291.